Supreme Court, U.S.
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No. 07-100

In the Supreme Court of the United States

KAY STALEY,

Petitioner,

v.

HARRIS COUNTY, TEXAS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

CONDITIONAL CROSS-PETITION

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QUESTION PRESENTED

If this Court reviews the Fifth Circuit's en banc ruling on vacatur, should it also review the en banc court's justiciability determination in order to avoid inconsistency and fundamental unfairness in the rulings?

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

For all the reasons set forth in the Brief for the Respondent in Opposition to the County's Petition, the en banc decision of the Fifth Circuit does not warrant review by this Court. If, however, this Court were to review the en banc court's ruling on vacatur, then this Court should also review the lower court's conclusion that the case is nonjusticiable. Those issues are inextricably intertwined in this case; and the vacatur arguments raised in the County's Petition implicate and conflict with the justiciability arguments that the County made below. Thus, reviewing the vacatur determination without also reviewing the justiciability determination would invite a logically incoherent and fundamentally unfair result.

OPINIONS BELOW

Cross-Petitioner incorporates by reference the statement of the Opinions Below set forth in the County's Petition.

JURISDICTION

Cross-Petitioner incorporates by reference the jurisdictional statement in the County's Petition, and adds the following: Cross-Petitioner Staley received the County's Petition for a Writ of Certiorari on July 30, 2007.

CONSTITUTIONAL PROVISION INVOLVED

Cross-Petitioner incorporates by reference the statement of the Constitutional Provision Involved set forth in the County's Petition.

STATEMENT

A. The Factual Background

Cross-Petitioner incorporates by reference the Factual Background set forth in the Brief for the Respondent in Opposition to the County's Petition.

B. The Proceedings Below

Cross-Petitioner incorporates by reference the statement of Proceedings Below set forth in the Brief for the Respondent in Opposition to the County's Petition, and adds the following:

The courthouse renovation, and its effect on the monument, came to light while this case was before the en banc court, so the district-court record includes no evidence or findings on the factual questions pertinent to whether the case is moot or whether the County is entitled to vacatur. The County did, however, make some factual representations directly to the en banc court.

1. The County made representations about its reasons for removing the monument, stating:

> [T]he closure and renovation of the courthouse were part of a preexisting restoration plan to overhaul the entire courthouse building and the surrounding property at a cost of some $65 million. Obviously, these actions were not taken for the purpose of mooting this dispute.

County's En Banc Br. 11.

The County also made representations to the en banc court about its intentions regarding redisplaying the monument, stating:

> When the Monument is again displayed to the public, it will be in a different location, because the redesign of the courthouse building and plaza will make it a physical impossibility to return the Monument to its past location.
>
> . . . .
>
> . . . [W]hen the Monument is again displayed to the public, it will . . . be a wholly different Monument. . . . [T]he physical location of the Monument, the public

> context, the neighboring monuments and displays, the dedication statements ... — will all be different.

County's En Banc Br. 8, 10.

The County relied on these assertions to argue that the case should be found moot, that the redisplay was unripe for review, and that the district court's decision should be vacated. *See id.* at 10-12.

2. On the basis of the County's representations, and in light of the County's removal of the monument four days before oral argument, the en banc court concluded that "[a]lthough the timing of the removal may be open to question, . . . the bottom-line cause of the removal was related to the ongoing renovations." Pet. App. 10a.

With respect to the redisplay, the en banc court held that:

> [A]ny dispute over a probable redisplay of the Mosher monument is not ripe because there are no facts before us to determine whether such a redisplay might violate the Establishment Clause. Indeed, no decision has been made regarding any aspect of the future display of the monument. In the absence of this evidence, we are unable to conduct the fact-intensive and context-specific analysis required by *McCreary* [*County v. ACLU of Kentucky*, 545 U.S. 844 (2005)], and *Van Orden* [*v. Perry*, 545 U.S. 677 (2005)]. Thus, any claim that the Establishment Clause may be violated after the Courthouse and grounds have been renovated, is not ripe for review.

Pet. App. 6a.

Finally, although the court found that the arguably benign reason the County advanced for the monument's removal was relevant to vacatur, the court concluded that the proffered justification was outweighed by other equitable factors calling for retention of the district court's decision. *Id.* at 10a-14a.

3. Two judges agreed with the majority that the case was nonjusticiable but parted company with the majority on vacatur, expressing the view that vacatur should always be granted when the mooting action is taken for reasons unrelated to the appeal. *See* Pet. App. 18a-25a (DeMoss, J., joined by Smith, J., dissenting in part). They thought that the County had established that it removed the monument without an illegitimate motive. *Id.* at 21a.

4. Three other dissenters did not believe that the County's statements to the en banc court carried the day on mootness. *Id.* at 16a-18a (Garza, J., joined by Clement and Owen, JJ., dissenting). They explained:

> [Harris County has not] made it absolutely clear that the Establishment Clause violation alleged to have occurred in this case could not reasonably be expected to recur. . . . Although Harris County asserts in its appellate brief that the redesign of the Courthouse will make it a "physical impossibility" to return the monument to its precise former location, such an assertion is not sufficient to satisfy the heavy burden of persuasion borne by Harris County, particularly since Harris County has made clear its intention to redisplay the monument once the renovations are complete.

Id. at 17a (internal citations omitted). Accordingly, these three dissenters would have remanded the case to the district court for factfinding on the County's plans and intentions. *See id.* at 18a.

REASONS FOR GRANTING THE CROSS-PETITION IF THE COUNTY'S PETITION IS GRANTED

If this Court Grants Review on Vacatur, it Should Also Consider the Related Issue of Justiciability, So as to Avoid a Logically Incoherent and Fundamentally Unfair Outcome.

A. Vacatur and justiciability turn on overlapping factual predicates.

Many of the considerations pertinent to a ruling on mootness also figure prominently in an assessment of the propriety of vacatur.

One of those considerations is the intent behind the allegedly mooting action. If a defendant acts with the specific intent to moot a case and intends to return to the challenged behavior once the case has been dismissed, the case is not moot. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953) ("It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." (quoting *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 333 (1952)). Similarly, if a defendant capitulates with the specific intent to undo an unfavorable decision, that fact will weigh against vacatur. *See* Br. for the Resp't in Opp'n 14-20.

A second factual matter on which both mootness and vacatur can depend is the litigants' timeliness in bringing the mooting event to the courts' attention. In *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), this Court held that the closure of the plaintiff-establishment did not moot a challenge to nude-dancing regulations in part because the establishment had failed to "mention a word about the potential mootness issue in its brief in opposition to the petition for writ of certiorari, which was filed in April 1999, even though . . . [the establishment] was closed and that property sold in 1998." *Id.* at 288. Likewise, in *Arizonans for Official English v. Arizona*, 520 U.S. 43

(1997), this Court vacated a district-court decision in the plaintiff-employee's favor in part because the employee had failed to timely inform the courts of her resignation. *Id.* at 74-75.

A third inquiry relevant to both justiciability and vacatur is the length of the litigation. Thus, in addressing mootness in *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216 (2000), this Court noted:

> It is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought.

Id. at 224. Likewise, the court below noted in denying vacatur that "Staley prevailed not only in the district court but also before a panel of this Court." Pet. App. 12a-13a.

Yet another overlap arises with respect to the likelihood that the challenged action will recur. A case is moot under the voluntary-cessation doctrine only if the defendant meets "the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). Likewise, if the party that mooted the case on appeal intends to revert to the challenged behavior after the trial court's decision is vacated, the courts of appeals treat that fact as an equitable consideration counseling against vacatur. *See, e.g.*, Pet. App. 13a-14a (considering, as part of vacatur analysis, that "the County has pledged to display the monument again," and concluding that retaining district-court decision would "serve[] the judicial and community interests by discouraging relitigation of the identical issues by the same parties under the same circumstances"); *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 121 (4th Cir.

2000) ("given that . . . there is no suggestion of the[] likely reenactment [of the challenged statutes], we see the public interest as no bar to vacatur").

That mootness and vacatur turn on overlapping considerations is hardly surprising, given that both doctrines speak to whether a litigant must continue to answer for the challenged behavior. And in light of the overlap, these issues will in some cases need to be considered together.

B. The en banc court's rulings on justiciability and vacatur were inextricably interrelated.

Courts have generally been willing to find a case moot and vacate a judgment for the plaintiff *only* when it is abundantly clear that the challenged behavior will not be repeated. *See, e.g.*, *Rendell v. Rumsfeld*, 484 F.3d 236, 241 (3d Cir. 2007); *Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 2251 (2007); *Khodara Envtl., Inc. ex rel. Eagle Envtl. L.P. v. Beckman*, 237 F.3d 186, 194 (3d Cir. 2001); *Valero*, 211 F.3d at 121; *Nat'l Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997); *Dilley v. Gunn*, 64 F.3d 1365, 1369 (9th Cir. 1995).

When, however, there is a reasonable likelihood that the defendant will return to the challenged activity, finding the case moot and awarding vacatur would be both judicially wasteful and fundamentally unfair to the non-mooting party because it would allow a repeat of the challenged behavior and relitigation of "the identical issues by the same parties under the same circumstances." Pet. App. 12a-14a. Accordingly, this Court has generally held that a case remains justiciable (and vacatur is therefore not even considered) when the defendant is reasonably likely to resume the activity. *See, e.g.*, *City of Erie*, 529 U.S. at 287 (plaintiff-establishment's closure did not moot challenge to nude-dancing regulations because plaintiff was "still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie"); *City of*

Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 (1982) (case not moot because "city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated"); *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968) (change in contracting regulations and dissolution of defendant-association did not moot case because association's members were not entirely precluded under new regulations from competing for contracts in future); *cf. Laidlaw*, 528 U.S. at 193-94 (remanding for mootness determination where plaintiffs prevailed in district court on claim against alleged polluter and defendant subsequently shuttered offending plant but retained discharge permit).

This case is unusual. It is not only reasonably likely that the County will redisplay the monument; it is a virtual certainty: The County has "pledged to display the monument again" (Pet. App. 13a; *accord id.* at 3a (the "County specifically has asserted that it will display the monument again after the renovations are complete"). But the details of the new display are entirely undeveloped in the record, thereby precluding application of the fact-specific analysis mandated by the Establishment Clause. Pet. App. 6a; *see McCreary*, 545 U.S. at 867 ("under the Establishment Clause detail is key"); *Modrovich v. Allegheny County*, 385 F.3d 397, 402 (3d Cir. 2004) (challenge to religious display "requires a fact-specific, case-by-case analysis"); *King v. Richmond County*, 331 F.3d 1271, 1276 (11th Cir. 2003) ("each [religious-display] challenge calls for line-drawing based on a fact-specific, case-by-case analysis"). Thus, the possibility of recurrence remains though the case has been found nonjusticiable.

This Court faced an analogous situation in *Walling v. James V. Reuter, Inc.*, 321 U.S. 671 (1944). There, the plaintiff had won in the district court, the decision had been reversed by the court of appeals, and the defendant-corporation had then dissolved while the case was pending in this Court. The

dissolution, undertaken "to secure tax advantages," had consisted of the "simple expedient of dissolving [the family business] and continuing the business under the individual control of members of the family." *Id.* at 673, 675. Although the case was not necessarily moot because a ruling could continue to bind the defendant's successors, the legal entity before this Court had ceased to exist. *Id.* at 673-76. So the Court analogized the circumstances to a case having become moot on appeal and held that "justice requires" that "petitioner is entitled to retain the benefit of the judgment entered in his favor by the District Court." *Id.* at 676-77. In disposing of the case in that fashion, this Court struck a balance between justiciability and vacatur: The Court deemed the case nonjusticiable and declined to address the merits, but it protected the judicial interest in avoiding relitigation of the same issues, and the plaintiff's interest in avoiding repetition of the challenged behavior, by retaining the lower-court judgment. *See id.* at 676-77.

In this case, the en banc court struck essentially the same balance. It could give the County the benefit of the doubt on justiciability, finding, without taking evidence, that "the bottom-line cause of the removal was related to the ongoing renovations" (Pet. App. 10a), and implicitly finding that the County did not intend to repeat the challenged behavior. But the en banc court took insurance on those assumptions by retaining the district-court decision, thereby precluding the County from merely repeating the precise behavior that the district court and appellate panel had held unlawful. Pet. App. 14a. That is, the court was willing to deem the case moot despite the County's plans to redisplay the monument — but only with a *guarantee* that the selfsame behavior would not be repeated.[1]

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[1] The court could take that approach without risking inconsistency in the factual predicates underlying the mootness and vacatur rulings because, under the legal standard that the court employed (and that the other circuits apply as well, *see* Brief for the Resp. in Opp'n 17-20), a mooting party's (continued...)

But if this Court were to reopen the vacatur question without also reopening the mootness determination, its ability to protect Staley's and the courts' interests would be compromised. Unlike the multifaceted equitable standard currently applied by the circuits, the County's proposed vacatur standard focuses exclusively on the intent behind the mooting action, turning a blind eye to the possibility of recurrence, the mooting litigant's lack of candor, and the length of the litigation. Thus, if the County's standard were adopted, Staley's ability to retain the district-court decision would be diminished,[2] even though all the other equitable considerations would remain unchanged. Staley would face the perverse result of being stripped of both a favorable decision and the ability to litigate her case to its conclusion, while at the same time having no assurance that the County will not simply repeat the selfsame challenged behavior immediately upon dismissal of the case. And if the County's Petition were granted but this Cross-Petition was not, neither this Court nor the lower courts on remand would be in a position to redress the inequity by taking the additional considerations into account as part of the justiciability analysis — as this Court did in *City of Erie*, 529 U.S. at 287-88 (considering likelihood of recurrence and mooting party's candor), *Adarand*, 528 U.S. at 224 (considering length of litigation), *Laidlaw*, 528 U.S. at 193-94 (considering likelihood of recurrence), *City of Mesquite*, 455 U.S. at 289 (same), and *Concentrated Phosphate*, 393 U.S. at 203 (same).

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[1] (...continued)
intent is just one of the considerations pertinent to vacatur. In ruling on vacatur, the en banc court could assume for the sake of argument that the County had not acted with an illegitimate motive because that consideration would in all events be outweighed by other equitable factors. *See* Pet. App. 10a-14a.

[2] Although the County would not necessarily prevail under the standard that it proposes (*see* Br. for the Resp't in Opp'n 12-13 n.7), its chances of prevailing would be much greater under that standard than under the standard normally applied by the courts of appeals.

C. The interplay between justiciability and vacatur is underscored by the tensions in the County's arguments.

The overlapping factual predicates underlying justiciability and vacatur, and the risk of an inconsistent and unfair result in this case, are highlighted by the inconsistencies between the justiciability arguments that the County made to the en banc court and the vacatur arguments that it now makes to this Court.

In arguing that the case was nonjusticiable, the County claimed that although it intended to redisplay the monument, it could not do so in the same manner as the old display; and hence, the new display would arise in an entirely different factual context that would require an entirely new constitutional analysis. *See* County's En Banc Br. 8, 10-11. The en banc court accordingly held that Staley's challenge to the future redisplay was unripe because that display would be subject to a different "fact-intensive and context-specific analysis" than the one undertaken by the district court. Pet. App. 6a.

In its Petition, however, the County claims that a consequence of retaining the district court's decision is that the ruling "will impede future litigation, should the County decide to redisplay the Monument." Pet. 16. Not only did the County not make that argument to the en banc court (*cf.* County's En Banc Br.), but the claim is fundamentally inconsistent with the positions that the County did take below. If, as the County argued to the en banc court, the circumstances of the courthouse renovation and the County's intentions are such that any redisplay would arise in an entirely new factual context that would require an entirely new constitutional analysis, then there is no reasonable basis to claim that the district court's decision will impede either the redisplay or litigation regarding that redisplay.

The only action that would be impeded by the district court's decision would be placement of the monument in

precisely "the same circumstances" as the old display (Pet. App. 14a), or in circumstances that are legally indistinct from the context of the old display — such as, for example, if the County were to reposition the monument a few feet to the left or right of the old display but otherwise left the context unchanged. But if there is a reasonable expectation that the County may pursue either of those options, as the County's argument suggests, then the case would not be moot. *See, e.g., Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville.*, 508 U.S. 656, 662 (1993) ("it is [not] only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect").[3]

The inconsistencies in the County's arguments underscore how the issues of vacatur and justiciability are intertwined in this case. For if the case is truly moot, then the challenged behavior cannot reasonably be expected to recur; and if the behavior will not recur, then retaining the decision would protect Staley's interests while causing the County no harm. Finding the case moot on the assumption that the behavior will not recur, while vacating the decision on the ground that retaining it would impede a recurrence, would rest the judgment on inconsistent factual predicates — and would countenance the County's efforts to undo an unfavorable decision by "attempting to manipulate the Court's jurisdiction." *City of Erie*, 529 U.S. at 288.

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[3] The arguments that the County makes regarding attorneys' fees are similarly in tension with the position it has taken on mootness. The mootness finding is necessarily predicated on Staley's having received the relief she requested. *See* Pet. App. 6a ("Out of sight in some warehouse, the monument no longer raises the potential Establishment Clause violations that offended Staley."). Yet in the attorney-fee context, the County argues that Staley has not prevailed. Pet. 15-16. The County cannot have it both ways: Either the case is moot because Staley has prevailed; or Staley has not yet definitively prevailed and the case remains alive.

D. This Court has not hesitated to couple intertwined issues for review.

This Court routinely addresses distinct but related issues in a single case. *See, e.g.*, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2677 (2006); *Carey v. Saffold*, 536 U.S. 214, 217 (2002); *Zadvydas v. Davis*, 533 U.S. 678, 686 (2001); *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 500-501 (1998); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 516-17 (1984).

The Court has been particularly inclined to do so when one of the questions relates to justiciability. *See, e.g.*, *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994); *City of Mesquite*, 455 U.S. at 288-89; *GTE Sylvania, Inc. v. Consumers Union of the U.S., Inc.*, 445 U.S. 375, 382 (1980); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978); *Sanabria v. United States*, 437 U.S. 54, 62 (1978); *Abney v. United States*, 431 U.S. 651, 655-56 (1977); *United States v. Nixon*, 418 U.S. 683, 690 (1974); *Concentrated Phosphate*, 393 U.S. at 202-03.

A similar course should be followed here in light of the close relationship between vacatur and justiciability in this case.

CONCLUSION

Nothing in this case merits this Court's time and attention. The en banc court's rulings on justiciability and vacatur both entail fact-intensive, case-specific applications of properly stated legal rules. *See* Sup. Ct. R. 10. If, however, this Court were to decide to review the vacatur determination, it should also revisit the justiciability question, because those issues are inextricably intertwined here. Reviewing one without the other would invite a logically incoherent and fundamentally unfair result.

Respectfully submitted.

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